Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–525 OF 1996
ABDUL MALIK ISHAK J
2 JUNE 2002

***Civil Procedure** — Striking out — Statement of claim — Striking out of amended statement of claim — Whether amended statement of claim revealed allegations of an ulterior motive or a collateral purpose — Whether the amended statement of claim plead the tort of an abuse of process — Whether amended statement of claim which was struck out was sustainable — Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)*

The plaintiff's claim was founded on negligence of the defendant in proceeding with the bankruptcy proceedings against the plaintiff by obtaining the adjudication and receiving orders although the plaintiff had settled the debt halfway through the bankruptcy proceedings. As a result thereof, the plaintiff was said to have suffered losses and claimed for damages. The learned senior assistant registrar heard an application by the defendant to strike out the plaintiff's amended statement of claim under O 18 r 19(1)(a), or (b), or (d) of the Rules of the High Court 1980 ('the RHC') and allowed the defendant's application. Aggrieved by that decision, the plaintiff filed a notice of appeal to the judge in chambers.

Held, dismissing the appeal:

(1) The amended statement of claim did not reveal any allegations by the plaintiff of an ulterior motive or a collateral purpose on the part of the defendant. The amended statement of claim did not plead the tort of an abuse of process. This was a plain and obvious case where the plaintiff's amended statement of claim should be struck out, as the plaintiff's claim was unsustainable (see pp 533A–B, 544C–D).

(2) The plaintiff in the present appeal had filed this suit only against the defendant and not against the defendant's solicitors. Thus, any allegation of a duty of care that was allegedly owed by the defendant's solicitors was totally misconceived (see p 537E–F); *Ng Ah Ho v Hong Leong Finance Bhd* [1996] MLJU 364 referred.

[Bahasa Malaysia summary

Tuntutan plaintif berdasarkan kecuaian defendan dalam prosiding di mana prosiding kebankrapan terhadap plaintif diteruskan dengan mendapatkan perintah penghukuman dan penerimaan walaupun plaintif telah menyelesaikan hutangnya ketika prosiding kebankrapan tersebut sedang didengar. Akibat daripada itu, plaintif dikatakan telah mengalami kerugian dan menuntut ganti rugi. Penolong kanan pendaftar telah mendengar satu permohonan oleh defendan untuk

membatalkan pernyataan tuntutan pindaan plaintif di bawah A 18 k 19(1)(a), atau (b), atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan membenarkan permohonan defendan. Terkilan dengan keputusan tersebut, plaintif telah memfailkan satu notis rayuan kepada hakim dalam kamar. A

Diputuskan, menolak rayuan tersebut: B

(1) Pernyataan tuntutan pindaan tersebut tidak mendedahkan apa-apa dakwaan oleh plaintiff tentang satu motif tersembunyi atau satu tujuan kolateral di pihak defendan. Pernyataan tuntutan pindaaan tersebut tidak menyatakan tentang tort penyalahgunaan proses. Ini adalah satu kes yang jelas dan nyata di mana pernyataan tuntutan pindaan plaintif sepatutnya dibatalkan, kerana tuntutan plaintif tidak boleh dibenarkan (lihat ms 533A–B, 544C–D). C

(2) Plaintiff dalam rayuan semasa telah memfailkan guaman ini hanya terhadap defendan dan bukan terhadap peguamcara defendan. Oleh itu, apa-apa dakwaan mengenai satu kewajipan berjaga-jaga yang dikatakan terdapat pada peguamcara defendan telah disalahtafsir sama sekali (lihat ms 537E–F); *Ng Ah Ho v Hong Leong Finance Bhd* [1996] MLJU 364 dirujuk.] D

Notes E

For cases on striking out of statement of claim, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5631–5641.

Cases referred to

Al-Kandari v JR Brown & Co [1988] QB 665 (refd) F

Allied Finance and Investment Ltd v Haddow & Co (1983) NZLR 22 (refd)

Arah Cipta Sdn Bhd & Anor v Kian Kee Sawmills (M) Sdn Bhd & Ors [1997] 2 MLJ 11 (refd)

Attorney-General of the Duchy of Lancaster v London & North Western Railway Co [1892] 3 Ch 274 (refd) G

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Bank of China v Asiaweek Ltd [1991] 2 MLJ 505; [1991] SLR 486 (refd)

Barton, Thompson & Co Ltd v Stapling Machines Co [1966] Ch 499, [1966] 2 All ER 222 (refd) H

Becker v Teale [1971] 3 All ER 715; [1971] 1 WLR 1475 (refd)

Boaler v Holder (1886) 54 LT 298 (refd)

Business Computers International Ltd v Registrar of Companies & Ors [1987] 3 WLR 1134 (refd)

Capital Music Centre (East Coast) Sdn Bhd v Koh Chit Kin & Anor [1988] 2 CLJ 287 (refd) I

Christie v Christie (1873) 8 Ch App 499 (refd)

Chop Chye Hin Chong v Ng Yeok Seng [1934] MLJ 265 (refd)
Clarke v Bruce Lance & Co [1988] 1 WLR 881 (refd)
Cracknall v Janson (1879) 11 Ch D 1 (refd)
Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor [1998] 1 MLJ 176 (refd)
Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang di-Pertua Negeri Sabah & Ors [1994] 3 MLJ 737 (refd)
Dominion Iron and Steel Co Ltd v Baron Invernairn (1927) WN 277 (refd)
Donoghue v Stevenson [1932] AC 562 (refd)
Dyson v AG [1911] 1 KB 410 (refd)
Evans v Barclays Bank and Galloway (1924) WN 97 (refd)
Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors [1996] 3 MLJ 259 (refd)
Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid [1998] 1 MLJ 615 (refd)
Gran Gelato Ltd v Richcliff (Group) Ltd & Ors [1992] Ch 560 (refd)
Greenhalgh v Mallard [1947] 2 All ER 255 (refd)
Henderson v Henderson (1843) 3 Hare 100 (refd)
Home Office v Dorset Yacht Co Ltd [1970] AC 1004; [1970] 2 All ER 294 (refd)
Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal [1998] 2 MLJ 498 (refd)
Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86 (refd)
Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors [1996] 5 MLJ 15 (refd)
Janov v Morris [1981] 3 All ER 780; [1981] 1 WLR 1389 (refd)
Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427 (refd)
KE Hilborne v Tan Tiang Quee; KS Chung v Tan Tiang Quee [1972] 2 MLJ 94 (refd)
Kapt (B) Hj Mohamad bin Ismail v Perwira Affin Bank Bhd [1999] MLJU 238 (refd)
Kellaway v Bury (1892) 66 LT 599 (refd)
Lai Yoke Ngan v Chin Teck Kwee [1997] 2 MLJ 565 (refd)
Lim Kit Siang v Pemangku Ketua Polis Daerah, Butterworth & Ors [1988] 2 MLJ 648 (refd)
Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)
Majid v Muthuswamy [1968] 2 MLJ 89 (refd)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425 (refd)
Millington v Loring (1880–81) 6 QBD 190 (refd)
Miranda v Khoo Yew Boon [1968] 1 MLJ 161 (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793 (refd)

Mohd Nor Rahmat v Bank Bumiputra Malaysia Bhd [1998] MLJU 251 (refd) A
Mooney & Ors v Peat Marwick Mitchell & Co & Anor [1967] 1 MLJ 87 (refd)
Moore v Lawson (1915) 31 TLR 418 (refd)
Nagle v Feilden [1966] 2 QB 633; [1966] 1 All ER 689 (refd)
New Ching Kee v KE Hilborne & Ors [1978] 2 MLJ 48 (refd) B
New Ching Kee v Lim Ser Hock [1975] 2 MLJ 183 (refd)
Ng Ah Ho v Hong Leong Finance Bhd [1996] MLJU 364 (refd)
Ng Kian Chong & Ors v Saw Seng Kee [1994] 3 MLJ 691 (refd)
Nor Azlina bte Abdul Aziz v Aminah bte Omar @ Minah bte Omar [1997] MLJU 308; [1998] 2 CLJ 527 (refd) C
North West Water Ltd v Binnie & Partners [1990] 3 All ER 547 (refd)
Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113 (refd)
Pengkalen Holdings Bhd v Dato' V Sivaparanjothi [1998] 1 MLJ 218 (refd)
Public Finance Bhd v S Ramasamy s/o KMS Chockalingam Chettiar [1990] 2 CLJ 431 (refd) D
QIW Retailers Ltd v Felview Pty Ltd & Anor (1989) 7 ACLC 510 (refd)
Ross v Caunters [1980] Ch 297 (refd)
Roy v Prior [1971] AC 470; [1970] 2 All ER 729 (refd)
Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd [1996] 2 MLJ 238 (refd) E
Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai [1997] 3 MLJ 281 (refd)
Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385 (refd)
Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors [1998] 1 MLJ 607 (refd) F
Tan Chai Heng v Yeo Seng Choon [1981] 1 MLJ 271 (folld)
Tan Keat Seng Kitson v Kerajaan Malaysia [1996] 1 MLJ 454 (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661 (refd) G
Ward v Lewis [1955] 1 All ER 55; [1955] WLR 9 (refd)
White & Anor v Jones & Anor [1995] 2 AC 207 (cited)
Wyatt v Palmer [1899] 2 QB 106 (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd) H
Young v Holloway (1895) P 87 (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule para 17
Legal Profession Act 1976 s 128(1) I
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)
Rules of the Supreme Court 1957 O 25 r 4

A *Ho Hon Keong* (*Kamarudin & Partners*) for the plaintiff.
Dhinesh Bhaskaran (*Shearn Delamore & Co*) for the defendant..

Abdul Malik Ishak J:

Introduction

B The learned senior assistant registrar ('SAR') heard encl 25 which was an application by the defendant to strike out the plaintiff's amended statement of claim in encl 22 under O 18 r 19(1)(a), or (b), or (d) of the Rules of the High Court 1980 ('the RHC'), and on 25 August 2000, the learned SAR allowed the defendant's application. Aggrieved by that decision, the plaintiff C filed a notice of appeal to the judge in chambers as seen in encl 29. Incidentally, the defendant has filed its amended statement of defence as seen in encl 23.

Facts of the case

D The plaintiff's claim was founded on negligence of the defendant in proceeding with the bankruptcy proceedings against the plaintiff by obtaining the adjudication and receiving orders although the plaintiff had settled the debt half way through the bankruptcy proceedings. As a result thereof, the plaintiff was said to have suffered losses and claimed for damages.

E The plaintiff filed the suit against the defendant on 14 October 1996 as reflected in encl 1. According to encl 1, the essence of the plaintiff's pleaded case against the defendant was simply that the defendant had negligently and/or in bad faith made the plaintiff a bankrupt based on a judgment debt owed by the plaintiff to the defendant notwithstanding the fact that the F plaintiff had settled the judgment debt. That judgment debt was settled by the plaintiff after the defendant had commenced the bankruptcy proceedings against the plaintiff.

Dissatisfied with the statement of claim as seen in encl 1, the plaintiff proceeded to file an application on 23 December 1999 to amend his G statement of claim and that application can be seen in encl 21. That application in encl 21 was supported by an affidavit affirmed by the plaintiff on 23 December 1999 which was filed on the same date and that affidavit in support can be seen in encl 20. One of the amendments sought by the plaintiff was to specifically delete and remove the allegation of mala fide from his statement of claim. According to the plaintiff, the allegation of H mala fide had originally been inadvertently included in his statement of claim and this averment can be seen in para 4 of encl 20 which was worded in this way:

> I Saya juga diberitahu oleh peguam saya bahawa peguam defendan telah menghubungi peguam saya sama ada saya akan mengemukakan butir-butir 'mala fide' sebagaimana yang dinyatakan dalam Pernyataan Tuntutan. Saya kemudiannya dinasihatkan dan percaya kemasukan 'mala fide' di perenggan 17 adalah dengan tidak sengaja dan saya telah mengarahkan peguam saya supaya memotong perkataan tersebut dari pernyataan tuntutan.

Using para 4 of encl 20 as a leverage, a submission was made on behalf of the defendant that such an averment showed the unequivocal admission by the plaintiff that there was no bad faith on the part of the defendant in obtaining and securing the adjudication and receiving orders against the plaintiff.

On 11 February 2000, the learned SAR allowed the plaintiff's application in encl 21. This meant that the statement of claim was duly amended as proposed by the plaintiff. On 4 April 2000, the defendant filed encl 25 which was an application to strike out the amended statement of claim and the suit.

The nature of the application in encl 25

It was an application to strike out the plaintiff's amended statement of claim under O 18 r 19 of the RHC. That rule is worded as follows:

> Striking out pleadings and indorsements
>
> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under para (l)(a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

It was the stand of the defendant that the plaintiff's pleaded cause of action against the defendant in the plaintiff's amended statement of claim was based on the defendant's alleged negligence in making the plaintiff a bankrupt. This, according to the defendant, was not a cause of action that was tenable in law. Put it bluntly, the defendant was saying that the plaintiff's claim in the amended statement of claim disclosed no reasonable cause of action against the defendant. In *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87, the court was faced with the question of whether the statement of claim ought to be struck out under O 25 r 4 of the Rules of the Supreme Court 1957 as disclosing no reasonable cause of action. Raja Azlan Shah J (as His Majesty then was) delivering the judgment of the court had this to say (see p 88 of the report):

> It is firmly established that the power exercisable under r 4 'is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for': see the judgment of Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86, 91.

> Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any statable case can be made for the application: see *Peck v Russell* (1923) 4 FMS LR 32, 34. The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses *some* ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out: see *Boaler v Holder* (1886) 54 LT 298. A recent exposition of the law is afforded by the judgment of Danckwerts LJ in *Wenlock v Moloney* [1965] 1 WLR 1238, 1243:
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>> 'Under the rule (ie O 25 r 4) it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed ... . But, as the procedure was of a summary nature the party was not to be deprived of his right to have his case tried by a proper trial unless the matter was clear.'
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> After stating that the former rules are now incorporated in the revised Rules of the Supreme Court, O 18 r 19, he continues:
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>> 'But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge'.

As to the meaning to be assigned to such words like '*no reasonable cause of action*', '*frivolous and vexatious*', and an '*abuse of the process of the court*' that appear in O 18 r 19(1)(a), or (b), or (d) of the RHC, reference to the case of *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 MLJ 691 should be made and there, at pp 698–700, I had this to say:

> *No reasonable cause of action*
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> It is said that a reasonable cause of action would mean a cause of action with some chance of success when only the allegation in the pleadings are being considered (*Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 (CA)). The mere fact that the cause of action is weak, and not likely to succeed, is no ground for striking it out (*Wenlock v Moloney*). There are several instances where the statement of claim will be struck out, and the action dismissed, eg in an action of contract if it appears that there is no contract between the parties, or no contract valid in law; or a totally illegal contract; or the cause of action brought solely to obtain relief from the court which has no power to grant it; and, last but by no means least, where relief is sought on a ground in which no such relief could be obtained (see *South Hetton Coal Co v Haswell, Shotton & Easington Coal and Coke Co* [1898] 1 Ch 465; *Humphrys v Polak* [1901] 2 KB 385; *Shaw v Shaw* [1965] 1 All ER 638; *Wing v Burn* (1928) 44 TLR 258 and *Johnston v Johnston* (1884) 33 WR 239 (CA)).
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> *Frivolous and vexatious*
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> These words relate to cases which are obviously unsustainable as would amount to an abuse of the process of the court. The courts must in their judicial discretion determine whether the proceedings are frivolous and vexatious (see *Attorney-General of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274). It is now trite law that the court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and 'almost incontestably bad' (*Dyson v AG* [1911] 1 KB 410). The pleading must, in all the circumstances,

> be so obviously frivolous that to advance it forward must be an abuse of the process of the court (*Young v Holloway* (1895) P 87).
>
> *Abuse of the process of the court*
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> It is said that the process of the court must be used bona fide and properly and must not be abused. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation (*Castro v Murray* (1875) 10 Ex 213).
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> The classifications of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed. Much will depend on all the relevant circumstances and, towards this end, the considerations of public policy and the interests of justice may be relevant and material. Thus, it is an abuse of the process of the court for a party to re-litigate the issue of fraud after it has been tried and decided by an Irish Court (*House of Spring Gardens Ltd v Waite* [1990] 2 All ER 990). It is also an abuse of the process of the court and the claim will be struck out if it is groundless and unfounded in the sense that the plaintiff does not know any of the facts to support it (*Steamship Mutual Underwriting Association Ltd v Trollope and Colls (City) Ltd* (1986) 33 Build LR 77 (CA)).
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> I must at once say that the burden upon an applicant who asks that a writ of summons and the statement of claim to be struck out is a heavy one. It is indeed onerous. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the court or is frivolous or vexatious.

In *Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd* [1996] 2 MLJ 238, the Court of Appeal was concerned with the issue of whether the statement of claim disclosed any cause of action in the context of a striking out application. In laying down the law, Mahadev Shankar JCA had this to say at p 249:

> Order 18 r 19(1)(b), (c) and (d) of the Rules of the Hgh Court 1980 have no application if the disputed facts once established at the trial will support a cause of action. The importance of first establishing the facts before attempting short cuts has been the subject of cases under O 33. The reasoning applies equally to applications under O 18 and O 19. The following statements should help in establishing the correct approach:
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> (i) 'If this issue were determined as a preliminary issue, the preliminary point might go to the House of Lords. They might say "You must get the facts before we decide the law." Rather than put the parties to all that expense (and, I may add delay), I think that we should have the facts ascertained in the trial court before the difficult and important point of law is decided ...': per Lord Denning MR in *Richards v Naum* [1966] 3 All ER 812 at p 815.
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> (ii) 'My Lords, in common with all your Lordships, I agree that this should be treated as the question to be answered.' But I hope your Lordships' agreement so to treat it will not discourage others to invoke the preliminary point procedure in unsuitable cases, or lead those whose task it is to decide whether or not the trial of preliminary points should be ordered to be other than extremely cautious before acceding to pleas for the making of such orders as a result of attractively advanced submissions founded on pleas of supposed economy ...': per Lord Roskill in *Allen v Gulf Oil Refining Ltd* [1981] 1 All ER 353 at p 364.

> (iii) 'The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether case 10 applies to a case where there are joint owners one only of which requires the house as a residence. So the case has reached this House on hypothetical facts, the correctness of which remained to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional ...': per Lord Wilberforce in the case of *Tilling v Whiteman* [1980] AC 1 at pp 17–18.

I must proceed ahead and refer to other cases. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the then Supreme Court (Abdul Hamid Omar (LP Malaysia), Eusoff Chin SCJ and Mohamed Dzaiddin SCJ), had occasioned to consider the issue of striking out and Mohamed Dzaiddin SCJ (now the Chief Justice of Malaysia), delivering the judgment of the then Supreme Court, had this to say (see pp 43–44 of the report):

> Thus, upon the facts and the several allegations pleaded in the respective pleadings of the parties, which we have highlighted above, can it be said that the counterclaim and the defence to counterclaim disclose no reasonable cause of action or defence, as the case may be, for this court to exercise its power to strike out the pleadings under O 18 r 19(1)(a) [of the Rules of the High Court 1980 ('the RHC')]? Secondly, based on the competing affidavits of the parties, can this court exercise its power under the said Order or under its inherent jurisdiction to strike out the same pleadings on the grounds that they are frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the court under r 19(1)(b), (c) or (d) of O 18?
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> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*) [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *Attorney-General of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney & Ors* [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
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> After considering the counterclaim and the defence to counterclaim, we are satisfied that both pleadings have raised some issues which require serious

> discussion. The appellants alleged that the respondent owed them a legal duty of care which arose from an agreement to sell the public-quoted shares belonging to the appellants, and that as a result of unreasonable delay in granting the approval to sell, they have suffered loss and damage. The respondent, on the other hand, denied that a duty of care existed between them. Furthermore, there is also a dispute on fact concerning the alleged agreement on 27 March 1990. The respondent maintained that there was no concluded agreement reached between the parties on 27 March 1990. Here, the parties relied on the correspondences in the respective affidavits filed in the action. This court as well as the court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v Lawson* (1915) 31 TLR 418; *Wenlock v Moloney & Ors*).
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> Bearing in mind the established principles stated above, we say that this is not a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. Nor can we say that they are frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the court. Accordingly, we dismiss both appeals with costs.

The appellant, in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 (FC), had entered into an agreement with the shareholders of the first respondent company for the purchase of land belonging to the company. He brought an action for specific performance of the contract and also brought an action against the respondent alleging that by entering into an agreement for the sale of the land from the first respondent to the second respondent, they induced a breach of contract of sale between the appellant and the shareholders of the first respondent. The respondents applied to strike out the appellant's claim against them and the learned trial judge gave judgment for the respondents. The learned trial judge found: (i) res judicata and issue estoppel against the appellant and 'that no cause of action could be successfully maintained' against the respondents; and (ii) that there was no evidence to indicate a breach of the agreement on the part of the respondents. The appellants appealed. The then Federal Court (Wan Suleiman, Seah and Mohamed Azmi FJJ) allowed the appeal and held that under O 18 r 19 of the RHC pleadings will only be struck out in plain and obvious cases and that so long as the statement of claim disclosed some ground of action, the mere fact that the plaintiff was unlikely to succeed at the trial was no ground for striking it out. The then Federal Court also held that the second respondent by entering into the agreement with the first respondent must have intended to cause the first respondent to commit a breach of the implied covenant that it would not part with the land so long as the agreement between the appellant and the shareholders was still subsisting. The then Federal Court also held that the breach of the implied covenant was an unlawful act and formed an unlawful element according to the alternative test of indirect interference. The then Federal Court further held that the doctrine of res judicata should not be applied because the cause of action and the issues were different. Now, of pertinence would be the speech of Wan Suleiman FJ (as he then was) in the context of the application for striking out and this was what his Lordship said (see p 109 of the report):

> It cannot be gainsaid that under O 18 r 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out. See *Mooney v Peat Marwick & Mitchell* [1967] 1 MLJ 87. We need only refer to a passage from another authority referred to by learned counsel, the Privy Council decision in *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136:
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>> 'It is a well established principle that the summary power under RSC Order 18 r 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases … . No evidence is admissible on a cause of action summons … the only documents that can be looked at are the writ, the documents referred to in the writ …'
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> Counsel therefore submitted that it was premature for the judge to hold that the claim against defendants is bad because there is no cause of action.

In *Capital Music Centre (East Coast) Sdn Bhd v Koh Chit Kin & Anor* [1988] 2 CLJ 287, Abu Mansor Ali J (as he then was) aptly said at p 290 of the report:

> As to the prayers of damages not being there it is not worst than demurable if we apply the test of Chitty J, in the *Republic of Peru v Peruvian Guano* (1887) 36 Ch D 489. The substance of the claim for damages is already being made in para 8 and counterclaim therefor in para 10 and all that needed to be done is to include in the prayers as to damages which is within the trial judge's discretion to allow in the event the trial judge is mindful to allow it and in case he finds that restitution is no longer possible. In dismissing the application to strike the defence and counterclaim, the court had regard to the case of *Wenlock v Moloney & Ors* [1965] 2 All ER 871 (not cited by parties) where an appeal was allowed by the Court of Appeal because the course taken therein amounted to trial in chambers and was neither authorized by the relevant rules nor an exercise of the inherent jurisdiction of the court. Similarly in this matter, the court could not presume without evidence there was affirmation and ride roughshod of the admitted issue of misrepresentation possibly bringing with it issues of damages and how much. Its duty was to ask was there defence and counterclaim? Its answer was in the affirmative. It therefore dismissed the application. Applicants appeal.

In *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661, a decision of the Court of Appeal (Siti Norma Yaakob, Mahadev Shankar JJCA and Abdul Malek Ahmad J), the Court of Appeal speaking through Mahadev Shankar JCA had this to say in regard to striking out (see pp 674–676 of the report):

> I suspect that, to a considerable extent, the trial judge's mind at the conclusion of the submissions may well have been influenced by the affidavits filed in support of, and against, the application under the other limbs of O 18 r 19(1), whereas when he came to write his judgment which he completed on 21 June 1995 he was constrained to look at the petition alone, and only then realized

that the question raised was not easily answered. Was that enough to direct that there should therefore be a trial?

With respect, I think we should first ask ourselves what a 'cause of action' is. *Stroud's Judicial Dictionary* (5th Ed) Vol 1 at p 378 gives 20 separate interpretations of this expression. I think the first is appropriate:

> 'A "cause of action" is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, *Read v Brown* (1889) 22 QBD 128; this case was applied in *Bennett v White* [1910] 2 KB 643).'

In considering this petition it is useful to remember that by O 1 r 4 a 'pleading' does not include a 'petition'. Therefore O 18 r 7 (which requires pleadings to be in a summary form of the material facts, and not the evidence by which these facts are to be proved) does not apply. But O 18 r 19(1)(a) only requires that the court assume the truth of the 'primary facts' alleged. It does not require that the petitioner's inferences from those facts should also be assumed to be true, unless those inferences necessarily follow. Nor is the court obliged to accept the 'conclusions' alleged or the relief sought, unless the factual basis for those conclusions or relief have been pleaded. In the present case there were nine respondents and the facts alleged against each had to be separately considered.

The words '*plain and obvious*' also need clarification. This case involved complex questions of company law. What may be 'plain and obvious' to a specialist in this field may not be so to another who does not have this specialized knowledge. I therefore feel obliged to state that the standard here is an objective one and implies that the perception required here is that of a person who has the required expertise. Support for this view can be found in *McKay v Essex Area Health Authority* [1982] 2 All ER 771, where it was held that the right course was for the court to strike out a claim, even though it required a long and elaborate hearing before the court was satisfied that there was no cause of action, because the plaintiff was entitled to be relieved of the objection to meet it.

And in *Re Saul D Harrison & Sons* [1994] BCC 162 at p 179 where Hoffman LJ said:

> 'But the question in this case is whether on the evidence taken as a whole and assuming in favour of the petitioner any disputed questions of primary fact, there is any case to answer. Of course it is always possible that discovery and cross-examination may produce some written or oral confession that the board were indeed acting in bad faith. But I do not think that the petition can be allowed to proceed to trial simply in the hope that something may turn up.'

And in *Ringtower Holdings Ptd* (1988) 5 BCC 82 at p 84 where Peter Gibson said:

> 'Further, I have anxiously throughout borne in mind the cautionary words of Lord Templeman in *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] 1 All ER 129 at p 139:
>
> > "... if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking

>>> out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself."
>>
>> If the applicants can satisfy the court that the petitioners' claims are manifestly, unsustainable or are an abuse of the process, justice requires that the petition (even one running to 28 pp, as this one does with the proposed amendments) be struck out forthwith.'
>
> There is an added dimension to O 18 r 19(1), in that the court will also strike out 'if the action has been brought solely to obtain relief which the court has no power to grant' (*Dreyfus v Peruvian Guano Co* (1889) 41 Ch D 151) or if relief be asked on a ground which is no ground for such relief. (*Johnston v Johnston* (1884) 33 WR 239— see 1995 1 SCP 1 SCP para 18/19/11).

In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 (FC), a decision of the Federal Court (Edgar Joseph Jr, Mohamed Dzaiddin FCJJ and Gopal Sri Ram JCA), the Federal Court speaking through Gopal Sri Ram JCA said at pp 122–123 of the report:

> Before we turn to consider the reasons given by the learned judge for striking out the appellant's petition there is a point of procedure which requires to be addressed.
>
> It would appear that when considering the company's notice of motion, the learned judge confined himself to the petition and disregarded the affidavit evidence that had been tendered before him. For this is what he said:
>
>> 'Further am I reminded by para 2 thereof [the reference here is to sub-r 2 of O 18 r 19] that no affidavit evidence is admissible. Although IRA No 1 [the company's affidavit] is taken as read, I entirely disregard it in my consideration of the main issue and proceed solely on the basis of the petition.'
>
> In a later passage he said:
>
>> 'PA No 1 [the appellant's affidavit] is an affidavit and an affidavit is not a pleading thus I disregard it for the purpose of the main issue.'
>
> Now, we must say at once that we are unable to agree with the approach taken by the learned judge. It is plain that he overlooked the fact that the company was moving the court, not only under para (a) of O 18 r 19(1), but was also relying on the other paragraphs of that rule and upon the court's inherent jurisdiction. That this is indeed the true position may be gathered from the words of the first prayer in the motion which uses the language appearing in paras (b), (c) and (d) of the first sub-rule. Subrule 2 of O 18 r 19 prohibits the use of affidavit evidence and confines the court to four corners of a pleading only in applications made under para (a). It is settled beyond doubt that affidavit evidence is always admissible upon an application made under the other paragraphs of the first sub-rule or under the inherent jurisdiction of the court. See *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16.
>
> In deciding to exclude from his consideration relevant and admissible evidence, the learned judge, apart from misdirecting himself on the correct legal principles, certainly failed to take into account relevant considerations. His decision on the merits of the application before him cannot therefore be treated as being unimpeachable on appeal.

Continuing at p 136, the learned Court of Appeal judge said:

> The power to summarily strike out a pleading must be sparingly exercised, and in respect of the philosophy that underlies the exercise of that power, we can do no better than to quote from the judgment of Mohamed Dzaiddin SCJ in *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at p 44:
>
> > 'This court as well as the court below is not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v Lawson* (1915) 31 TLR 418 and *Wenlock v Moloney & Ors* [1965] 1 WLR 1238).'
>
> For the reasons appearing in this judgment we had no alternative but to reverse the learned judge's decision.

In *Arah Cipta Sdn Bhd & Anor v Kian Kee Sawmills (M) Sdn Bhd & Ors* [1997] 2 MLJ 11, a decision of the Court of Appeal (Shaik Daud, Mahadev Shankar and Abu Mansor JJCA), the Court of Appeal held that on the facts, the appellants had managed to make out reasonable causes and that the several allegations of facts as stated by the appellants must be ventilated at a proper trial. Abu Mansor JCA (as he then was) remarked at p 13 of the report:

> After hearing arguments of both parties, we were unanimous that it was not such a plain and obvious case that the statement of claim should be set aside. We held that the appellants had managed to make out, as pleaded, reasonable causes that needed ventilation at a proper trial. Therefore, we allowed the appeal and set aside the decision of the learned judge and ordered that the case should go to trial.

And his Lordship rounded up the matter by saying that (see p 15 of the report):

> With respect, we found merit in the argument of the counsel for the appellants and we upheld his submission that as far as the pleadings went, the appellants were entitled to go to trial. We were satisfied that the several allegations of facts as stated above needed ventilation at a proper trial in order to determine these proceedings. By the same token, we also held that this case should not have been summarily dismissed as stated, it is not such a plain and obvious case. We allow the appeal with costs and set aside the order of the learned judge. The deposit was ordered to be refunded.

In *Pengkalen Holdings Bhd v Dato' V Sivaparanjothi* [1998]1 MLJ 218, a decision of Nik Hashim JC (as he then was) revolved on the following set of facts. The respondent's firm Messrs V Siva & Partners, was appointed by the petitioner to represent them in a takeover bid and in a separate action, wherein the petitioner and six of its directors were the defendants. After having paid the respondent's bill of costs in full, and subsequent to the takeover bid, the new board of directors and managers of the petitioner claimed that the said bill of costs was excessively high, and they filed a petition for the same to be taxed pursuant to s 128(1) of the Legal Profession Act 1976. The respondent then filed an application under O 18 r 19 of the RHC to strike out the said petition. After perusing through the petition and the affidavits, his Lordship Nik Hashim JC (as he then was) aptly said (see p 223 of the report):

> In the event, I hold that the petition is scandalous, frivolous and an abuse of the process of the court as the petition discloses no reasonable cause of action whatsoever. In the circumstances, I would allow the respondent's application to strike out the petition and accordingly, I dismiss the petition with costs to be taxed.

I pause here for a moment. There are two other authorities on striking out that should be referred to. They are:

(1) *Stamford Holdings Sdn Bhd v Kerajaan Negeri Johor & Ors* [1998] 1 MLJ 607, a decision of the Court of Appeal; and

(2) *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal* [1998] 2 MLJ 498, also a decision of the Court of Appeal.

However, of pertinence would be the case of *Ibrahim bin Mohamad v Ketua Polis Daerah Johor Bahru & Ors* [1996] 5 MLJ 15, where, at pp 20–21 of the report, I had this to say in regard to striking out generally:

> Be that as it may, this court is invested with extensive powers to strike out pleadings, to dismiss actions by plaintiffs or for that matter to enter judgments against defendants. These powers are necessary evils. It is necessary for the courts generally to not only enforce the basic rules of pleadings but also to take immediate steps to dispose of proceedings which are hopeless, baseless or without foundation or are otherwise an abuse of the process of the court. The courts normally exercise these powers by summary process, operating speedily and at an early stage of the proceedings. Without a doubt it is an effective method to dispose of proceedings without the need to call witnesses.
>
> The summary powers of the court to strike out pleadings, dismiss actions and enter judgments are derived from two major sources. One source is under the RHC. The other source flows from the court's inherent jurisdiction. Lord Esher in *Davey v Bentinck* [1893] 1 QB 185 (CA) at p 187 was of the view that these two sources are cumulative and not alternative, and may be invoked by the parties and employed by the court simultaneously. Lord Blackburn in *Metropolitan Bank v Pooley* (1885) 10 App Cas 210 at pp 220 and 221 and Brown LJ in *Willis v Earl Beauchamp* (1886) 11 PD 59 at p 63, had earlier on blazed the same trail and held similar views as that of Lord Esher MR in *Davey*'s case. One must not forget that such summary powers are permissive, not mandatory, and they confer a discretionary jurisdiction upon which the court will exercise its judicial discretion in the light of all the surrounding circumstances concerning the offending pleading (see *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 3)* [1970] Ch 506; [1969] 3 All ER 897; *Hampshire County Council v Shonleigh Nominees Ltd* [1970] 2 All ER 144; [1970] 1 WLR 865). Two other fundamental principles governing the summary powers of the court to strike out pleadings must be put forth. It is this:
>
> (1) The parties will not easily be driven from the seat of judgment or to borrow the words of Fletcher-Moulton LJ in *Dyson v AG* [1911] 1 KB 410 at p 419:

> 'To my mind, it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.'

Thus, the courts have, in the past and in the near future, exercised its discretionary power with the greatest care and circumspection, and only in the clearest cases (see *Lawrance v Lord Norreys* (1890) 15 App Cas 210 (HL) at p 219).

(2) The dismissal of the proceedings or even the stay thereof may 'often be required by the very essence of justice to be done' (see *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 (HL) at p 221), and this is normally done in order to prevent the parties from being harassed and put to considerable expense by frivolous, vexatious or hopeless litigation (see *Riches v DPP* [1973] 2 All ER 935 at p 942; [1973] 1 WLR 1019 at p 1027).

Where a pleading discloses no reasonable cause of action, it will be ordered to be struck out. In a situation where the statement of claim is struck out, the court is empowered to stay the action or the court may even order judgment to be entered against the defendant. No evidence, including affidavit evidence, is admissible on an application under O 18 r 19(1)(a) of of the RHC. Since the court is required to examine the pleading itself, the court is entitled to assume that the facts pleaded are true and undisputed. But a word of caution must be advanced. It is this. That the court only assumes the truth of the primary facts alleged but is not required to assume as true the inferences made by the applicant from those facts, unless, of course, those inferences necessarily follow. The court too is not obliged to accept the conclusions alleged or the relief sought, unless, of course, the factual basis for those conclusions alleged or the relief sought have been pleaded with clarity (*Mooney & Ors v Peat Marwick Mitchell & Co & Anor*; and *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals*). I venture to say that the court will not embark on a minute examination of the documents and the facts in order to see whether a party has a cause of action or defence, as the case may be (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd*; *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427; *Lim Kit Siang v Pemangku Ketua Polis Daerah, Butterworth & Ors* [1988] 2 MLJ 648; and *Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai* [1997] 3 MLJ 281). But, it must not be forgotten that the summary procedure under O 18 r 19(1)(a) of the RHC would only be applicable to cases that are plain and obvious (*Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 at p 91 (CA); *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565; *Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor* [1998] 1 MLJ 176; and *Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid* [1998] 1 MLJ 615). It is germane to mention that whether an issue is plain and obvious does not depend upon the length of time it takes to argue but rather whether, when the issue had been argued to the fullest, it becomes plain and obvious that there could only be one result (*Bank of China v Asiaweek Ltd* [1991] 2 MLJ 505, [1991] SLR 486). It is also useful to note that the rigours of O 18 r 19(1)(a) of the RHC would only be brought to bear in a situation where the case is clear beyond doubt as exemplified by *Kellaway v Bury* (1892) 66 LT 599 at p 602 (CA); *Dyson v AG* [1911] 1 KB 410 at p 414 (CA); and *Dominion Iron and Steel Co Ltd v Baron Invernairn* (1927) WN 277. Again, O 18 r 19(1)(a) of the RHC would also be activated in a situation where the cause of action or the defence is, on the face of it, obviously unsustainable (*Attorney-General of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274 at p 277 (CA); *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (PC); and *Tan Keat Seng Kitson v Kerajaan Malaysia* [1996] 1 MLJ 454). Again, O 18 r 19(1)(a) of the RHC would also be vigorously applied when it is totally unarguable (*Nagle v Feilden* [1966] 2 QB 633 at p 651, [1966] 1 All ER 689 at p 697 (CA), per Salmon LJ). Now, the following cases like *Boaler v Holder* (1886) 54 LT 298; *Moore v Lawson* (1915) 31 TLR 418 (CA); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294 (HL); and *Roy v Prior* [1971] AC 470, [1970] 2 All ER 729 (HL) lay down the following principle of law: that as long as the statement of claim discloses some cause of action or some question fit to be tried, whether the question be a question of law or equity or fact or mixed law and fact, then the mere fact that the case is weak or may not be likely to succeed at the trial is no ground and cannot be a ground for striking out the pleading as disclosing no reasonable cause of action. Neither would a pleading be struck out where it raises an arguable, difficult, complicated or an important point of law (*Evans v Barclays Bank and Galloway* (1924) WN 97 (CA); and *Barton, Thompson & Co Ltd v Stapling Machines Co* [1966] Ch 499, [1966] 2 All ER 222). In *Wyatt v Palmer* [1899] 2 QB 106 (CA), the pleading was not struck out since there were important and complicated matters to be tried. All these authorities serve as useful guidelines.

However, what is of importance is this. The court must be satisfied that no reasonable cause of action is disclosed in the statement of claim or for that matter in any particulars served under it (*Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 (SC) (where there was no cause of action disclosed in the statement of claim); and *Ward v Lewis* [1955] 1 All ER 55, [1955] WLR 9 (CA) (where special damage was not pleaded in an action for slander and such material omission might lead to the striking out of the action)).

The court too is empowered to strike out a pleading or an indorsement when it is scandalous (O 18 r 19(1)(b) of the RHC), frivolous (also under O 18 r 19(1)(b) of the RHC) or vexatious (also under O 18 r 19(1)(b) of the RHC). Scandalous matters are said to be those matters which are indecent or offensive or involving allegations that were made for the purpose of abusing or prejudicing the opposite party as envisaged in *Christie v Christie* (1873) 8 Ch App 499 (CA); *Millington v Loring* (1880–81) 6 QBD 190 (CA); and *Cracknall v Janson* (1879) 11 Ch D 1 (CA). To be considered frivolous, the pleading must be such that if it is advanced it would be an abuse of the process of the court (*Young v Holloway* (1895)

P 87 at p 90). In regard to a vexatious proceeding, reference should be made to para 17 of the Schedule to the Courts of Judicature Act 1964 which enacts as follows:

> Power to restrain any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons, from instituting any legal proceedings in any court save by leave of a judge. A copy of any such order shall be published in the Gazette.

and it gives the power to the High Court upon being satisfied that any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings to order that no legal proceedings may be instituted by that person without the leave of the court. Incidentally, it would also be ideal in the context of a vexatious proceeding to refer to the case of *Becker v Teale* [1971] 3 All ER 715, [1971] 1 WLR 1475 (CA).

The court is also empowered to strike out a pleading or an indorsement when it amounts to an abuse of the process of the court as envisaged under O 18 r 19(1)(d) of the RHC and this ground was amply set out in encl 25 thereof as required by the case of *Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors* [1996] 3 MLJ 259. An abuse of the process of the court may arise when its process is used in bad faith and for an improper purpose. It is an abuse of the process of the court when the process is misused. Examples of such misuse are quite rampant. Thus, it would be an abuse of the process of the court when the plaintiff brings a second action for the same cause of action especially when the first action had been dismissed for failure to comply with a peremptory order of the court bearing in mind that according to the case of *Janov v Morris* [1981] 3 All ER 780, [1981] 1 WLR 1389 (CA), such peremptory orders are supposed to be complied with forthwith and not ignored. It would also be an abuse of the process of the court in the following factual situations:

(1) where the defence is simply filed for the purpose of delaying and playing for time (*Public Finance Bhd v S Ramasamy s/o KMS Chockalingam Chettiar* [1990] 2 CLJ 431);

(2) where the parties have readily submitted themselves to the jurisdiction of one forum and yet seek to complain about the same subject matter in another forum (*Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793);

(3) where the party seeks relief which should have been done in a previous action (*Henderson v Henderson* (1843) 3 Hare 100 at p 115; and *Greenhalgh v Mallard* [1947] 2 All ER 255 (CA)); and

(4) where the same issue raised in different proceedings between different parties are to be relitigated (*North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547).

With these authorities in mind, I must now proceed to the heart of the matter.

Analysis of the whole matter

The amended statement of claim alleged negligence on the defendant's part in making the plaintiff a bankrupt. I will, in due course, demonstrate that this was not a cause of action recognizable in law. The only recognized torts would be the tort of malicious prosecution and the tort of an abuse of process. But the plaintiff had not pleaded either of these torts in his amended statement of claim. I will now proceed to examine the following issues:

(a) That no cause of action lies in law for a mistake or a negligent act done in a court proceeding

It would be appropriate to refer to the decision of Kamalanathan Ratnam JC (as he then was) in the case of *Ng Ah Ho v Hong Leong Finance Bhd* [1996] MLJU 364 when discussing this issue. There, the learned judicial commissioner held that mere negligence in the use of the legal process cannot find an action in law and that the only recognized actions in law would be that of malicious prosecution and the tort of an abuse of the process of the court. In that case, the defendant had commenced proceedings against the plaintiff there and had obtained judgment and thereafter presented a bankruptcy petition against the plaintiff. But, somehow, the action was settled in the course of the bankruptcy proceedings. The defendant then proceeded to obtain the adjudication and receiving orders against the plaintiff. The plaintiff then filed a suit and claimed that he was wrongfully made a bankrupt and sued the defendant for damages. The learned judge held that since neither malicious prosecution nor the tort of an abuse of the process had been pleaded by the plaintiff, the plaintiff's claim was consequently held not to be grounded upon any accepted cause of action and it was doomed to fail. In so holding the way he did, the learned judge cited with approval a passage that appeared in *Salmond and Heuston on the Law of Torts* (20th Ed) at p 411 which was worded as follows (see p 16 of the MLJU report in the case of *Ng Ah Ho*):

> … So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability; and, conversely, if there are reasonable grounds for the proceedings (for example, the probable guilt of an accused person) no impropriety of motive on the part of the person instituting these proceedings is in itself any ground of liability. Therefore, it is necessary to distinguish between honesty of belief and honesty of motive; the former is relevant to the question of reasonable and probable cause, the latter to the question of malice. (*Horner v Irwin & Son Ltd* [1972] NI 202, 204).

The learned judicial commissioner in *Ng Ah Ho* also applied generously the decision of the English court in the case of *Business Computers International Ltd v Registrar of Companies & Ors* [1987] 3 WLR 1134 especially the judgment of Scott J at p 1138 and at pp 24–25 of the MLJU report in the case of *Ng Ah Ho*, the learned judicial commissioner said:

> In *Business Computers International Ltd v Registrar of Companies & Ors* [1987] 3 WLR 1134 Scott J said at p 1138:

> > 'It is implicit in the decision that the commencement of bankruptcy proceedings or the presentation of a winding up petition cannot found an action in damages unless associated with malice.' A
>
> In that case, the alleged negligence was negligence in the presentation and prosecution of a winding up petition. The court held that negligence by itself did not suffice. A tortious duty of care was not owed by one litigant to another unless associated with malice. B

The learned judicial commissioner in *Ng Ah Ho* then proceeded to explain the rationale behind the case of *Business Computers International Ltd* and this was what he said at pp 25–26 of the MLJU report:

> Obviously the rationale behind this set principle must be that without this caveat, an honest litigant might not dare to bring a claim for fear that if he loses he might be sued for damages. Indeed in *Rondel v Worsley* [1967] 3 All ER 993 (HL), Lord Pearce said at p 1024: C
>
> > 'The legal process inevitably creates hardships and it is not always easy to see what is the right balance. In attempting to do so one must regard the interrelation of the various parts. It is a hardship that a man who has done no wrong should be subjected by a plaintiff to a baseless charge, in meeting which he will incur large expense. The charge may be reported largely in the newspapers and injure his reputation. ... . But the basic hardship is inevitable and will always remain, namely, that any plaintiff can use the legal machine as a sounding board for untruthful allegations and cause harm, trouble and expense to an innocent defendant, and yet the law holds him (and the press who report the case) immune from paying damages for their untruth. Yet, to remove this immunity would create a great injury to justice. Without it, the honest litigant might not dare to bring an honest claim for fear that if he fails he might be sued for damages'. D E

Now, I would be forgiven if I were to examine the case of *Business Computers International Ltd*. In that case, the second defendant had negligently served a winding up petition at an address which was not that of the plaintiff's registered address, and the court there duly granted a winding up order in the absence of the plaintiff. The plaintiff held the view and contended that it had suffered damage as a result of the winding up order and so the plaintiff brought an action in negligence against the second defendant. Scott J in a well written judgment aptly said at p 1142 of *Business Computers International Ltd*: F G

> Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the originating process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent, are antagonists. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system. The system stipulates the rules and requirements that must be observed by the two parties. The plaintiff must issue his process and must serve it on the defendant. If there is default in service the process may be struck out. If an order is obtained without the prescribed rules or regulations having been observed, the order may be discharged or set aside, sometimes by an application at first instance, sometimes on appeal. The prosecution of the action or of the petition is subject throughout its career from institution to final judgment to judicial control. Service of process is a step, and usually an essential step, in the prosecution. It must usually be proved before an order H I

> can be obtained against an absent defendant. The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd. The safeguards against ineffective service of process ought to be, and I think must be, found in the rules and procedures that govern litigation. The rules and procedures require that, save on ex parte applications, proof of service be shown before an order is made against an absent party. If the proof of service is false, be it through negligence or design, an order may be made that should not have been made. The injured party's remedy is to have the order set aside. An action for damages cannot be based on the falsity of the proof of service. Nor, in my judgment, can the adequacy of the efforts made to effect service be subjected to a tortious duty of care.

Continuing at pp 1143–1144 of *Business Computers International Ltd*, Scott J had this to say:

> In *Kelly v London Transport Executive* [1982] 1 WLR 1055, Lord Denning MR, in an obiter passage, suggested that a tortious duty of care might be owed by the solicitors of a legally aided party to the other party. This passage was commented on by Sir John Donaldson MR in *Orchard v South Eastern Electricity Board* [1987] QB 565. He pointed out that Lord Denning MR's remarks were not supported by the other two members of the court, and then said, at p 571:
>
>> 'I have quoted from the judgment [of Lord Denning MR] at some length for two reasons. First, because it provides a useful summary of the duties of a solicitor acting for a legally aided client. Whether that duty is owed to the opposing party is open to considerable doubt, at least where the solicitor is acting with the authority of his client and is not carrying on the litigation on his own account. However, the duty is undoubtedly owed to the court (see *Myers v Elman* [1940] AC 282 at p 302 per Lord Atkin), the duty being to conduct the litigation with due propriety, and the court may, in the exercise of its traditional jurisdiction over its own officers, order the solicitor to compensate the opposing party where the solicitor is in breach of that duty to the court.'
>
> I take this passage from Sir John Donaldson MR's judgment as supporting the view that I have endeavoured to express, namely, that control of litigation and of the various steps taken in prosecuting litigation lies in the court and the rules and procedures that govern litigation and cannot be sought via a tortious duty of care imposed on one party for the benefit of the other.
>
> This view is not, in my opinion, undermined but is reinforced by the facts of the present case. Mr Martineau has submitted forcefully that the plaintiff has been damnified, through no fault of its own, and that, on the plaintiff's pleaded case, the damage would not have happened had the second defendant exercised proper care in ascertaining the correct address of the plaintiff's registered office. All this I am prepared to accept. But the damage of which the plaintiff complains was caused by the legal process instituted by the second defendant and by the winding up order made by the court. Damage of this character is not, in my judgment, apt to be remediable in an action based on tortious negligence.
>
> In my judgment, there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that

> control the litigation and not in tort. I am therefore of opinion that the plaintiff's statement of claim does not disclose a reasonable cause of action against the second defendant and ought to be struck out.

It was sought to argue that the case of *Ng Ah Ho* was distinguishable from the facts of the present appeal in encl 29. Of course, factually speaking no two cases are alike but the law as distilled in *Ng Ah Ho* is certainly germane and thought provoking. Be that as it may, the differences between *Ng Ah Ho* and the present appeal were alluded to by the plaintiff's counsel in the following ways:

(i) In *Ng Ah Ho*, the defendant after realizing that the adjudication and receiving orders had been wrongly applied for, had on the very next day timeously filed an application to rescind the said orders.

(ii) In *Ng Ah Ho*, the defendant had also admitted its mistake.

(iii) In *Ng Ah Ho*, the plaintiff was not even aware that the adjudication and receiving orders had been made against him nor did the plaintiff knew of the annulment of the said orders until very much later.

(iv) In the present appeal, when the defendant realized that it had negligently or wrongfully applied for the adjudication and receiving orders to be entered against the plaintiff notwithstanding the fact that the plaintiff had settled the judgment debt sum directly with the defendant's solicitors to stop the bankruptcy, the defendant had, instead of applying for an annulment of the adjudication and receiving orders, written to the official assignee informing them that the defendant had filed the notice of discontinuance.

(v) In the present appeal, it was only at a later stage that the defendant's solicitors had filed an application on behalf of the plaintiff to annul the adjudication and receiving orders.

(vi) In the present appeal, the defendant had prepared and caused the plaintiff to swear an affidavit deposing to certain facts alleging that the judgment debt was settled by a third party after the plaintiff had been legally adjudged a bankrupt.

(vii) In the present appeal, it was averred in the amended statement of claim that the defendant and its solicitors have committed a fraud on the court and the official assignee as well as the plaintiff.

(viii) In *Ng Ah Ho*, the agreement between the plaintiff and the defendant was to withdraw all legal proceedings upon payment of a certain sum of money and the court held that both parties had overlooked the bankruptcy proceedings in their negotiations and this was supported by the exchange of letters where no mention were made, at all, in regard to the bankruptcy proceedings. Whereas in the present appeal, payment was made specifically to stop the plaintiff from being adjudicated a bankrupt.

(ix) In *Ng Ah Ho*, the court held that the fact that the defendant had promptly applied to annul and rescind the adjudication and receiving orders was sufficient proof that there was no evidence of malice. Whereas in the present appeal, the facts were entirely in the opposite direction since the acts of the defendant's solicitors were said to be indicative that the defendant's solicitors:

(1) have refused to admit that they had made a mistake or acted negligently; and

(2) have dishonestly put the blame on the plaintiff.

It was argued on behalf of the plaintiff that the defendant and the defendant's solicitors beliefs and motives were dishonest. It was pointed out that there was not an iota of evidence to show that in any of the defendant's action or the action of the defendant's solicitors that they had honestly used the legal process for its lawful purpose. It was submitted that there was no reasonable ground nor explanation advanced by the defendant to show that they had gone about obtaining the adjudication and receiving orders and then setting aside the said orders in an innocent way. It was pointed out that while the case of *Ng Ah Ho* revolved on the single act of mere negligence or mistake, the present appeal were riddled with a series of unreasonable negligent acts, mistakes and omissions and to confound the matter further it was pointed that there was fraud on the court, the official assignee and the plaintiff. It was vigorously submitted on behalf of the plaintiff that the case of *Ng Ah Ho* were distinguishable and ought to be distinguished. It was urged upon me that in the event the pleadings were found waiting in material particulars, the plaintiff should be allowed to amend the same. For this purpose, the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 was relied upon and there the court allowed the amendment to the pleadings at the appeal stage. The plaintiff through his counsel went to the extreme to show that he had a reasonable cause of action against the defendant and the plaintiff too pointed out that his case was not scandalous, frivolous or vexatious or an abuse of the process of the court. The plaintiff referred to the amended statement of claim and I shall endeavour to highlight certain salient features of the amended statement of claim. Paragraphs 1 to 8 of the amended statement of claim showed the relevant facts that led to the plaintiff being adjudged a bankrupt when the adjudication and receiving orders were made against him at the request of the defendant's solicitors, namely Messrs Shearn Delamore & Co. It was pointed out that there was gross negligence on the part of the defendant because the plaintiff had settled the debt due on 10 January 1994 directly to the defendant's solicitors, namely, Messrs Shearn Delamore & Co. It was submitted that Messrs Shearn Delamore & Co had accepted the settlement sum on behalf of the defendant and the said law firm had agreed to withdraw the creditor's petition yet the said law firm had gone to court on 23 February 1994 and obtained the adjudication and receiving orders against the plaintiff. The learned counsel for the plaintiff submitted that:

> The act of the defendant's agent was not one of mere negligence, but gross negligence. It was an action without reasonable and probable cause, a wrongful act against the plaintiff caused by the reckless conduct on the part of the defendant and their solicitors.

To say the least, it was a strong submission aimed at both the defendant and their solicitors.

Paragraphs 9 to 13 of the amended statement of claim showed the facts which transpired after the adjudication and receiving orders were made. These paragraphs itemised the conduct of the defendant and their solicitors, namely, Messrs Shearn Delamore & Co and that conduct may conveniently be stated in these ways:

(i) Instead of immediately applying to annul the adjudication and receiving orders, the defendant applied six days later on 29 February 1994 to discontinue this action thereby maintaining the status quo of the adjudication and receiving orders against the plaintiff.

(ii) Eight months after the defendant had discontinued the action, which was on 10 November 1994, the defendant then applied upon the demand of the plaintiff to annul the adjudication and receiving orders.

(iii) The affidavit to annul the adjudication and receiving orders can be seen in the bundle of documents at pp 90–91 thereof. That affidavit was worded in this way:

> DALAM MAHKAMAH TINGGI TANAH MELAYU DI KUALA LUMPUR (BAHAGIAN PERDAGANGAN)
> DALAM PERKARA KEBANKRAPAN (SELANGOR) NO D2–29–817–1993
> Per: Mohamed Yusop bin Abdul Wahab
> Ex parte: American Express (M) Sdn Bhd
>
> AFIDAVIT
>
> Saya, Mohamed Yusop bin Abdul Wahab (No K/P:0957876) dan beralamat di No 17 Lorong Dua, Taman Desa Minang, 68100 Gombak, Selangor Darul Ehsan dengan ini berikrar dan menyatakan seperti berikut:
>
> 1 Bahawa saya adalah si bankrap di dalam kes ini. Semua fakta yang di turunkan di sini adalah benar setakat pengetahuan saya.
>
> 2 Bahawa perintah-perintah penerimaan dan penghukuman telah dibuat terhadap saya pada 23 Februari 1994 oleh Mahkamah Tinggi, Kuala Lumpur di atas permohonan American Express (M) Sdn Bhd.
>
> 3 Seorang pihak ketiga telahpun menjelaskan keseluruhan hutang kepada pemiutang pemetisyen.
>
> 4 Saya telah membayar wang yang mencukupi kepada pegawai pemegang harta, sebagai penyelesaian penuh segala perbelanjaan pegawai pemegang harta.
>
> 5 Bahawa saya tidak mempunyai hutang-hutang lain.
>
> 6 Dengan demikian, saya dengan rendah diri memohon satu perintah memansuhkan dan membatalkan perintah penerimaan dan perintah penghukuman yang telah dibuat terhadap saya pada 23 Februari 1994.

Diikrarkan oleh

Mohamed Yusop bin Abdul Wahab)

No K/P: 0957876) Sgd (Illegible)

pada 10hb November 1994)

Pesuruhjaya Sumpah Malaysia

No A-B041

PN RABAIYAH BTE SULAIMAN

Sgd (Illegible)
Pesuruhjaya Sumpah
(Commissioner For Oath(s))
Mahkamah Sesyen & Majistret
Ampang

It was the stand of the plaintiff that the said affidavit was prepared by Messrs Shearn Delamore & Co for the plaintiff instead of the defendant and it was said that the defendant and their solicitors knew that the said affidavit was false particularly the allegation that the settlement sum was paid by a third party. It was also said that the said affidavit was drafted in a language which gave the impression that the monies were paid subsequent to the adjudication and receiving orders. That was said to be a lie by omission. It was also said that the defendant and their solicitors had also omitted to state in the said affidavit that the defendant had negligently and without reasonable cause obtained the adjudication and receiving orders.

(iv) It was the stand of the plaintiff that he had actually paid RM500 costs to the official receiver; thus giving the picture that the plaintiff was properly adjudicated a bankrupt and was now discharging himself after the third party had settled the debt.

It was the submission of the plaintiff through his counsel that such conduct as alluded to above was nothing short of being contemptuous. It was an abuse of the process of the court and it was also submitted that this was not a mere case of want of care by Messrs Shearn Delamore & Co. It was submitted that there was concealment of the true facts from the court. It was submitted that there was fraudulent conduct by the solicitors from Messrs Shearn Delamore & Co on the plaintiff and the court. It was pointed out that the defendant's solicitors had acted on the instructions of the defendant.

The plaintiff emphasized that the adjudication and receiving orders were annulled on 5 December 1994 and that the plaintiff was wrongly made a bankrupt for ten months. It was also emphasized that the defendant and their solicitors did not even offer nor extend a word of apology.

Paragraphs 8, 10 and 13 of the amended statement of claim spoke of the losses and the damages suffered by the plaintiff.

It was submitted on behalf of the plaintiff that the amended statement of claim was sufficient to establish a reasonable cause of action. The plaintiff emphasized that:

(i) Paragraph 7 of the amended statement of claim showed that the defendant 'telah dengan cuainya atau secara salah memohon'.

(ii) Paragraph 8 of the amended statement of claim showed that the plaintiff 'rasa malu dan seksaan'.

(iii) Paragraphs 10 and 11 of the amended statement of claim averred that this was due to the 'tindakan yang tidak wajar oleh defendan dan/atau peguamnya'.

(iv) Paragraph 16 of the amended statement of claim averred that 'tindakan defendan adalah salah, tanpa sebab dan cuai.'

(v) Paragraph 17 of the amended statement of claim also averred that 'tindakan defendan yang salah, cuai dan tanpa sebab munasabah.'

According to the plaintiff, these words that appeared in the amended statement of claim, in summary form, were sufficient to ground a reasonable cause of action against the defendant. According to the plaintiff, legal terms like 'malicious prosecution' and an 'abuse of the process of the court' were not employed in the amended statement of claim. However, it was pointed that the material facts as alluded to in the amended statement of claim were sufficient to show the existence of 'malicious prosecution' and an 'abuse of the process of the court' by the defendant and their solicitors.

The plaintiff then implored this court to allow him to re-amend his amended statement of claim in order to expressly incorporate the legal terms which would give him the necessary clout to pursue his cause of action against the defendant. The plaintiff also implored this court that if the suit was struck out, the plaintiff would be prejudiced because he would be time barred by limitation to bring a fresh suit even though the matter had not been heard on its merits.

Interestingly, the defendant submitted through their learned counsel that the plaintiff's submissions sought to improve on the contents of the amended statement of claim. This, according to the defendant's counsel, was clearly impermissible. It was submitted that certain words were employed by the plaintiff's counsel in the course of the submissions wherein there were allegations of 'gross negligence', 'reckless conduct', 'contemptuous conduct', 'abuse of the process of the court', 'abuse of fiduciary position' and 'fiduciary conduct' on the part of the defendant and its solicitors. But, according to the defendant's counsel, none of these allegations can be found in the plaintiff's amended statement of claim. Indeed, the submissions of the learned counsel for the defendant were true in all aspects. The usage of those words in order to improve the contents of the amended statement of claim as alluded to were simply done in order to bolster the plaintiff's claim and nothing else. In regard to the allegation that the defendant and its solicitors had procured the execution of a false affidavit by the plaintiff, one must note that quite apart from the fact that the affidavit in question was executed and affirmed by the plaintiff himself there was no suggestion whatsoever that the contents of that affidavit were inaccurate in any way. Moreover, it must be noted that the affidavit was executed and affirmed after the plaintiff was adjudicated a bankrupt. In regard to the submission that this court ought to grant the plaintiff leave to re-amend his amended statement of claim instead of striking out his claim, it must be noted that the defendant had filed its application to strike out the plaintiff's claim as seen in encl 25 on 4 April 2000, yet the plaintiff had shown no interest in applying to amend his amended statement of claim and instead had steadfastly chosen not to file such an application. At any rate, any amendment to the amended statement of claim would run counter to the plaintiff's own previous application to amend the statement of claim by deleting the allegation of mala fide. In my judgment, this was a plain and obvious case where the plaintiff's amended statement of claim should be struck out as the plaintiff's claim was unsustainable. The present appeal was unlike the case of the plaintiff in *Capital Music Centre (East Coast) Sdn Bhd v Koh Chit Kin & Anor* which sought to clarify its claim. In regard to the submission that the defendant could not apply to strike out the plaintiff's claim as the matter had been set down for trial, it must be pointed out that the plaintiff only amended his statement of claim on 11 February 2000 to remove the allegation of *mala fide* and it was because of this amendment that the defendant applied on 4 April 2000 to strike out the plaintiff's claim. The case of *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak Yang di-Pertua Negeri Sabah & Ors* [1994] 3 MLJ 737 which involved the interpretation of the various provisions of the Sabah Constitution was certainly different from the present appeal.

An interesting point was raised by the plaintiff through his learned counsel. It was this. That the defendant and its solicitors have a duty of care to the plaintiff as they had promised not to adjudicate him a bankrupt and had subsequently breached that duty of care by an act of gross negligence and want of reasonable care. Cases are abound in regard to the defendant's solicitors duty of care to the plaintiff, if indeed that duty really exists in the context of the present appeal. I need to refer to some of these cases. For starters, I shall refer to the case of *Al-Kandari v JR Brown & Co* [1988] QB 665. This was a case where the defendant's solicitors were held to owe a duty of care to the opposing party in litigation. The case was set against very unusual circumstances. The plaintiff there was involved in a custody battle with her Kuwaiti husband over their children, and the defendant's solicitors acted for the husband. There was a real risk that the husband would attempt to take the children to Kuwait, even though custody had already been granted to the plaintiff's wife. The parties agreed that the husband's passport would be retained by the defendant upon the order of the court. To enable the children's names to be removed from the passport, the said passport was then released to the Kuwaiti Embassy. Somehow, the husband managed to obtain his passport and he then kidnapped the children. The Court of Appeal held that the defendant's solicitors owed a duty of care to the plaintiff's wife, which they breached by not informing her that the passport had been released to the embassy.

With respect, in *Al-Kandari v JR Brown & Co*, the Court of Appeal adopted the neighbour principle in *Donoghue v Stevenson* [1932] AC 562 in order to ascertain liability notwithstanding the fact that the neighbour principle will rarely be appropriate as the loss caused by the solicitor's negligence will be purely economic in nature.

Next, reference should be made to the case of *Gran Gelato Ltd v Richcliff (Group) Ltd & Ors* [1992] Ch 560, where the plaintiffs there were proposing to purchase an underlease from Richcliff, and their solicitors sent enquiries before contract asking whether there were any rights affecting the superior lease which might inhibit the enjoyment of the underlease. The second defendants, who were Richcliff's solicitors, mistakenly replied 'Not to the lessor's knowledge.' There were, in fact, redevelopment break clauses in the headleases which might cause the underlease to determine prematurely. Richcliff was found to be liable for this misrepresentation but not the second defendant. Nicholls VC applied the tripartite test of foreseeability, proximity and whether it was just and reasonable to impose a duty of care, and his Lordship refused to make the solicitors liable because it was not just and fair to find against them when the principle was also liable.

I will revert to these two cases (*Al-Kandari v JR Brown & Co)* and *Gran Gelato Ltd v Richcliff (Group) Ltd & Ors*, once again, in the later part of this judgment.

In *Miranda v Khoo Yew Boon* [1968] 1 MLJ 161, the court was concerned about the professional negligence of an advocate and solicitor. It arose out of a civil action in the sessions court in which Khoo Yew Boon ('Khoo') had retained Miranda as his advocate and solicitor. Khoo failed in his defence to this action and had instructed Miranda to appeal. The notice of appeal was filed within the prescribed time but the memorandum was not filed within the time as allowed by the rules. Miranda then made an unsuccessful application for an extension of time relying upon his clerk's ignorance of a change in the relevant rule. The court held that, as an advocate and solicitor, Miranda was under a contractual duty to use care and he failed to do so and he was found to be negligent.

In *Majid v Muthuswamy* [1968] 2 MLJ 89, the then Federal Court (Wee Chong Jin CJ, Tan Ah Tah FJ and Winslow J) was concerned with a claim for damages for negligence on the part of a deceased solicitor by a client in relation to three court proceedings. The claim was dismissed by the High Court as the statement of claim did not disclose a cause of action against the defendant. The plaintiff appealed. In dismissing the appeal, the then Federal Court held that the statement of claim in two out of the three proceedings disclosed no cause of action because the statement of claim not only did not allege that the deceased solicitor was the solicitor of the present plaintiff in those two actions but clearly stated that the deceased solicitor was appearing in those two actions as solicitor for a trade union. In regard to the third proceeding, the then Federal Court held that where an attempt to amend the pleadings was made during the appeal it would be an abuse of the process of the court to allow those portions of the statement of claim with the proposed amendments which relate to the bankruptcy proceedings to stand. Incidentally, by way of an obiter Wee Chong Jin CJ was of the view that in Singapore, an advocate and solicitor could be sued for professional negligence where the act complained of was an act done in his capacity as a solicitor but he would not be liable for negligence if the act complained of was done in his capacity as an advocate.

Next, it would be the case of *KE Hilborne v Tan Tiang Quee; KS Chung v Tan Tiang Quee* [1972] 2 MLJ 94 and the facts may be stated as follows.

The respondent claimed damages for loss and expense caused by the negligence or breach of contract of the respondent's solicitors in the purchase of a piece of property and in proceedings and matters relating thereto. The negligence or breach of contract alleged was the failure of the firm to notify the respondent of the receipt of a letter from the vendor who gave notice that the contract of sale was required to be completed within a certain period. The loss or damage alleged to have been suffered by the respondent was the loss of opportunity of completing the purchase on the vendor's terms with the prospect of obtaining vacant possession at a later date or, alternatively, with the prospect of suing the vendor for damages for failing to give vacant possession. The firm acted on behalf of both the vendor and the purchaser in this land transaction. The trial judge held that the first plaintiff had failed in his duty to the respondent, but awarded the respondent only nominal damages of and costs on the ground that the respondent had consistently denied signing the contract of sale. The first appellant appealed against the whole judgment, including the order as to costs. The second appellant appealed only on the costs order. The respondent cross-appealed on the ground that the trial judge was wrong in awarding nominal damages and ought to have awarded substantial general damages. On appeal to the Court of Appeal (Wee Chong Jin CJ, AV Winslow J and Tan Ah Tah J), it was held at p 94, in dismissing the appeal, that:

> (1) it was plainly the duty of the firm to notify the respondent of the contents of the letter from the vendor, and to seek the respondent's instructions on the contents thereof. ... [T]his was the clearest possible case of breach of duty on the part of the firm, and in particular, on the part of Mr Hilborne [the first appellant]. He [the first appellant] was clearly negligent in that under the retainer he failed to exercise the care that he was required by law to show towards his client. A reasonably careful and competent solicitor acting for both parties would have sought their instructions immediately;
>
> (2) the learned trial judge was entitled on all the evidence and on his assessment of the credibility of the respondent, to reject the respondent's evidence. Therefore, any pecuniary loss that the respondent suffered did not flow naturally from the breach of duty on the part of Mr Hilborne [the first appellant] or his firm;
>
> (3) the cause of action in the present case was breach of contract and not tort. Therefore, the principle is that a plaintiff, even though he in fact has suffered no pecuniary loss arising from a defendant's breach of contract, is in general entitled to nominal damages;
>
> (4) There was no reason to interfere with the trial judge's discretion in awarding the costs of the trial to the respondent.

Next, it would be the case of *New Ching Kee v KE Hilborne & Ors* [1978] 2 MLJ 48. That was a case where the plaintiff was involved in a traffic accident on 18 November 1970 when he was run into by a motor scooter ridden by one Lim. As a result of this accident, he suffered injury. The defendants, advocates and solicitors, were engaged by the plaintiff to act for him in his claim against Lim for damages arising out of the accident. The plaintiff claimed that the defendants had negligently and in breach of the implied term of their agreement failed to serve the writ of summons on Lim before 7 August 1974 on which date the action against Lim became statute barred. The defendants' main reason why they found themselves having to apply for renewal of the writ on 31 July 1974 for a period of six months as from 7 August 1974 was that their file relating to the plaintiff's matter had been misplaced in their office from 21 August 1973 till 29 July 1974. The defendants' application to renew the writ claiming for damages was dismissed — see *New Ching Kee v Lim Ser Hock* [1975] 2 MLJ 183. In allowing the plaintiff's claim, the Singapore High Court held that the defendants were negligent in having failed to serve the writ within the 12 months allowed, which was before the expiry of the writ on 7 August 1974. The court also awarded damages amounting to $12,255.20 to the plaintiff on the basis that this was the sum that the plaintiff would have received in his claim against Lim had it been successfully proceeded with, it being undisputed that Lim was 100% liable for the accident.

This would be followed by the case of *Tan Chai Heng v Yeo Seng Choon* [1981] 1 MLJ 271. That was the case where the facts as distilled from the affidavits showed that neither the solicitor nor his clerk used sufficient diligence to ensure that the appeal be brought in time. The court found that the appellant's solicitor was negligent.

It is a correct proposition of law to say and I so say that a solicitor acting for a client in a civil case will owe no duty of care to the opponent either in litigation or in non-contentious business. Two leading cases on this point would be *Al-Kandari v JR Brown & Co* and *Gran Gelato Ltd v Richcliff (Group) Ltd & Ors*. The Court of Appeal in *Al-Kandari v JR Brown & Co* affirmed the general rule that a solicitor does not normally owe any duty of care to the opposing party in hostile litigation. Two reasons were advanced. Firstly, such claims could lead to endless re-litigation (per Lord Donaldson MR at p 672C of *Al-Kandari*'s case). Secondly, that a solicitor in advising his client who is engaged in litigation where each party attempts to achieve the best result for himself that solicitor can act without regard to the other's interests (per Bingham LJ at p 675F–H of *Al-Kandari*'s case). But in *Al-Kandari*'s case, the Court of Appeal held that a duty was owed in the circumstances of the case because the defendants had stepped outside their role as solicitors for their client and voluntarily accepted responsibilities to the opposing party. The Court of Appeal proceeded to award damages for the plaintiff's physical and mental injuries and it would be likely that similar considerations would apply in claims for economic loss.

It has been demonstrated that an alternative test for liability for economic loss is the voluntary assumption of responsibility. This was the approach of Lord Donaldson MR in the *Al-Kandari*'s case when his Lordship said at p 672D of the report:

> In voluntarily agreeing to hold the passport to the order of the court, the solicitors had stepped outside their role as solicitors for their client and accepted responsibilities towards … the plaintiff … .

Similarly, in *Gran Gelato Ltd v Richcliff (Group) Ltd & Ors*, Nicholls VC summarized the case of *Allied Finance and Investment Ltd v Haddow & Co* (1983) NZLR 22, where a duty was owed, and his Lordship remarked that 'the solicitors must be taken to have assumed personal responsibility ...' and had 'accepted a direct responsibility' (see p 572A of *Gran Gelato Ltd*).

The pertinent question to pose would be this: why should there be no duty of care owed by solicitors to their client's opponent? The obvious answer can be found in the simple reasoning that if such a duty exists then there would be a conflict between the duties owed by a solicitor to his client as well as to the other side. Sir Robert Megarry in *Ross v Caunters* [1980] Ch 297 at p 322A–B aptly said:

> In broad terms, a solicitor's duty to his client is to do for him all that he properly can, with, of course, proper care and attention .... The solicitor owes no such duty to those who are not his clients. He is no guardian of their interests. What he does for his client may be hostile and injurious to their interests; and sometimes the greater the injuries the better he will have served his client.

And these very passages were cited with approval by the Court of Appeal in *Clarke v Bruce Lance & Co* [1988] 1 WLR 881 at p 887D–F and by Farquharson LJ in *White & Anor v Jones & Anor* [1995] 2 AC 207 at p 231E–H.

All these propositions of the law are certainly interesting. For the present exercise, I need not go any further.

All said and done, the pertinent point to note would be this. That the plaintiff in the present appeal had filed this suit only against the defendant and not against the defendant's solicitors. Thus, any allegation of a duty of care that was allegedly owed by the defendant's solicitors, namely, Messrs Shearn Delamore & Co was totally misconceived. Be that as it may, I would, without hesitation, apply the principles of law distilled in *Ng Ah Ho* and *Business Computers International Ltd,* in adjudicating encl 29.

The plaintiff also relied on the unreported judgment of the case of *Kapt (B) Hj Mohamad bin Ismail v Perwira Affin Bank Bhd* [1999] MLJU 238 together with the case of *Mohd Nor Rahmat v Bank Bumiputra Malaysia Bhd* [1998] MLJU 251 to drive home the point that the defendant's solicitors owed a duty of care to the plaintiff. But, with respect, I have read these two cases anxiously and I discovered that in neither of those cases was the question of whether the plaintiff had a sustainable cause of action in negligence actually raised and argued. These two cases must be contrasted sharply with cases like *Ng Ah Ho* and *Business Computers International Ltd* where the validity of the plaintiff's cause of action in negligence was comprehensively argued and considered.

Reverting back to the case of *Business Computers International Ltd,* Scott J had blazed a trail when he said that 'there is no duty of care owed by one litigant to the other as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings.' I have since discovered that several text book writers have accepted the validity of the principle as enunciated by Scott J in *Business Computers International Ltd.* The learned authors of *Clerk & Lindsell on Torts* (18th Ed) at p 301, at para 7–37 relied on *Business Computers International Ltd* and stated that:

> A litigant does not owe a duty to his adversary in relation to the conduct of the proceedings. Here the policy reason for the immunity is that the safeguards against impropriety should be found in the rules and procedures of the court rather than in the law of tort (*Business Computers International Ltd v Registrar of Companies* [1988] Ch 229).

In the same vein, the learned authors of *Charlesworth & Percy on Negligence* (9th Ed) at p 46, at para 2–49 aptly said:

> No duty of care was found to have been owed in the following instances, namely between: a judge and the litigants, appearing before him (*Arenson v Casson, Beckman, Rutley & Co* [1977] AC 405 at p 431, *per* Lord *Kilbrandon; Sirros v Moore* [1975] QB 118); one litigant and another, as to the manner in which the proceedings are conducted.

And at the footnote of the same text book of the same page, the following legend appears:

> *Business Computers International v Registrar of Companies*, 137 New LJ 758, whether in regard to service of process or any other step in the action, since the safeguards against impropriety are compliance with the rules and procedure that control litigation, rather than tortious remedies.

Finally, the learned authors of *Salmond and Heuston on the Law of Torts* (21st Ed) at pp 396–397, aptly said:

> No action will lie for the institution of legal proceedings, however destitute of reasonable and probable cause, unless they are instituted maliciously — that is to say, from some wrongful motive (*Williams v Taylor* (1829) 6 Bing, 183, 186). Malice and absence of reasonable and probable cause must unite in order to produce liability. So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability; and, conversely, if there are reasonable grounds for the proceedings (for example, the probable guilt of an accused person) no impropriety of motive on the part of the person instituting these proceedings is in itself any ground of liability. Therefore it is necessary to distinguish between honesty of belief and honesty of motive; the former is relevant to the question of reasonable and probable cause, the latter to the question of malice (*Horner v Irwin & Son Ltd* [1972] NI 202, 204).
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> 'Malice' means the presence of some improper and wrongful motive — that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purpose (*Dorene Ltd v Suedes (Ireland) Ltd* [1891] IR 312). It can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor (*Brown v Hawkes* [1891] 2 QB 718, 722): for example, prosecuting a person for theft in order to deter others from committing similar depredations (*Stevens v Midland Counties Ry* (1854) 10 Ex 352, 356), the levying of blackmail, or the coercion of the accused in respect of some unconnected matter, such as the obtaining of compensation or restitution from the accused (the civil law, not the criminal, being the

> appropriate instrument for this purpose). Again, a prosecution is not malicious merely because inspired by anger for the injury suffered (as distinct from anger at some other activity of the accused — eg his perjured evidence in other proceedings: *Glinski v McIver* [1962] AC 726), for this is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law (*Brown v Hawkes* (1891) 2 QB 718, 722.

And continuing further at p 399 thereof, the learned authors of *Salmond and Heuston on the Law of Torts* (21st Ed) wrote:

> Having considered the liability of litigants for the malicious abuse of legal process, it remains to consider how far they are responsible for mere errors and irregularities of procedure in the absence of any malice. The rule is that no action will lie against any person for procuring an erroneous decision of a court of justice. This is so even though the court has no jurisdiction in the matter and although its judgment or order is for that or any other reason invalid. A court of justice is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the court commits. Every party is entitled to rely absolutely on the presumption that the court will observe the limits of its own jurisdiction and decide correctly on the facts and the law (*Lock v Ashton* (1848) 12 QB 871). But a party who has actually misled the tribunal by his fraud or malice may be liable, and there is even authority for saying that one who prefers a charge to a magistrate (even though in vague language and by way of suspicion) is liable for the ulterior consequences and may not say they were due to the mistake or indiscretion of the tribunal he has set in motion (*Fitzjohn v Mackinder* (1860) 8 CB (NS) 78).

It is interesting to note that the views of the learned authors of *Salmond and Heuston on the Laws of Torts* (21st Ed) bore striking resemblance to the views of Shaw CJ in *Chop Chye Hin Chong v Ng Yeok Seng* [1934] MLJ 265, where his Lordship speaking for the Appellate Court of Appellate Civil Jurisdiction (Shaw CJ and Barrett-Lennard J) had this to say (see p 266 of the report):

> It is a well established principle both with regard to civil and criminal matters that a person is not liable in damages for putting the law in motion unless he is actuated by malice. It is the right of everyone to put the law in motion if he does so with the honest intention of protecting his interests but it is an abuse of that right if he proceeds maliciously and without reasonable and probable cause for anticipating success. An example of this will be found in the difference that exists between an action for wrongful arrest and one for malicious prosecution. In the case of the first, where a man acts on his own initiative, proof of malice is not necessary to give a right to recompense by damages. In the case of the second, where the interposition of the court is obtained, malice must be established. An example may again be found in the form of an action for abuse of ordinary civil process. Malice and absence of reasonable and probable cause must again be proved in the same manner as in an action for malicious prosecution (*Mitchell v Jenkins*, 5 B & Ad 588). The case of wrongfully obtaining the issue of a writ of extent in England is perhaps as closely analogous to wrongfully obtaining the issue of a distress warrant under our law as can possibly be obtained. Authority to issue such a writ, which is a special remedy for the recovery of Crown debts, is obtained on application to the court on affidavit very similar to the application for a distress warrant under our Civil Procedure Code. Although damages may be obtained

> for maliciously issuing such writ, (see *Craig v Hasell*, 4 QB 481) damages cannot be recovered for the mere wrongful issue of the writ without malice, (see *Pridgeon v Mellor*, 28 TLR 261) the reason being, as stated in the latter case, that there is a judicial determination interposed between filing of the affidavit on which the writ is issued and the issue of the writ, and the issue of the writ is in consequence of that interposition and therefore persons acting without malice are protected. A B

All these legal semantics would weigh in favour of the defendant, and this meant that encl 29 ought to be dismissed with costs.

Lest I be accused of an oversight, I must proceed further.

(b) Has the plaintiff pleaded the torts of malicious prosecution and/or an abuse of process? C

Under this head, one must venture to ask whether the plaintiff has pleaded something more than mere negligence against the defendant. To be specific, whether the plaintiff has pleaded the torts of malicious prosecution and/or an abuse of process. I have since perused through the amended statement of claim and I must conclude that the plaintiff had failed to do so. Parties are certainly bound by their pleadings and the present appeal was not an exception. On pleadings generally, I had this to say in *Nor Azlina bte Abdul Aziz v Aminah bte Omar @ Minah bte Omar* [1997] MLJU 308, [1998] 2 CLJ 527 which must surely apply to the facts of the present appeal. At pp 530–533 of the CLJ report, this was what I said: D E

> This case, like all the other cases, proceeded on the basis that the parties are bound by their pleadings. That is the settled law. The journals are replete with authorities on this point. Suffice for the present exercise that a few of them will be referred to. Thus, the Court of Appeal (Mathew CJ, Spenser Wilkinson and Hill JJ) in *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 dutifully decided the case on the pleadings. Mathew CJ writing a separate judgment and with whom Spenser Wilkinson J agreed, observed: F
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>> 'Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan, and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial judge had no alternative but to order specific performance of the agreement or to award damages. I think, it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions, they must be placed on the record, which in this case they were not, *Blay v Pollard & Morris* [1930] 1 KB 628.' G
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> In *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] MLJ 99, Buttrose J writing for the Court of Appeal (with whom Wee Chong Jin CJ and Tan Ah Tah J agreed) observed at p 101 of the report: H
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>> 'While one can appreciate the dilemma in which the learned trial Judge found himself as the result of his findings he has, with the greatest respect, in my opinion, decided the case on issues not raised by the pleadings and against the admissions contained in them and the evidence.
>>
>> The case, in my view, must be decided on issues raised by the pleadings which bind parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment. I

> For these reasons alone, in my judgment, his decision cannot be allowed to stand and in the circumstances of this case, I have come to the conclusion that in order to do justice between the parties a new trial must be ordered.'

MacIntyre FJ writing for the then Federal Court (comprising of Barakbah LP, Azmi CJ (Malaya) and MacIntyre FJ) in *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 had this to say at p 24 of the report:

> 'The sole issue for trial was whether Khatijah had acquired an indefeasible title by adverse occupation before 30 May 1955. The reference by counsel to the *Trustees, Executors, and Agency Co Ltd and Templeton v Short* was an unnecessary display of legal erudition which had the unfortunate effect of side-tracking the learned judge's mind into deciding the case upon an issue not properly before the court.'

There is considerable authority in regard to the purpose and effect of particulars filed pursuant to O 19 r 7A of the Rules of the Supreme Court. At p 31 of *Halsbury* (3rd Ed) Vol 3, the learned commentator had this to say:

> 'A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are, in effect, part of the pleadings under which they are delivered.'

In *Thomson v Birkley* [1883] 47 LTR p 700, Watkin Williams J says:

> 'The object of particulars is to prevent surprise, and to limit and particularize events in order that both parties should come to trial fully prepared for the issues.'

In *Spedding v Fitzpatrick* [1888] 38 Ch D 410 at p 413, Cotton LJ says:

> 'The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.'

In *Thorp v Holdsworth* [1876] Ch D 637 at p 639, Jessel MR says:

> 'The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of order XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.'

Finally, in *Yorkshire Provident Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 114 at p 152, Lindley LJ says:

> 'What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars — of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars.'

Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the appellants were not obliged to call evidence to rebut.

In *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 (FC), Raja Azlan Shah (CJ Malaya) (as His Majesty then was) aptly remarked:

> 'As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground in which his evidence has been improperly excluded.'

In *Siti Aisha binti lbrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 at p 125 (FC), Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court), in restoring the order of the learned President of the Sessions Court, spoke of the importance of pleadings in these words:

> 'On the other hand, counsel for the respondent argued that on the pleadings it was the appellant's case that at the time of the collision she was "lawfully walking along the proper side of the road" whereas in her evidence she said she was walking across the road. It is the respondent's contention that the failure to abide by her pleadings was fatal and the appellant's claim must therefore be dismissed. The case of *Menah binti Sulong @ Minah binti Sulong @ Aminah binti Sulong v Lim Soo & Anor* (*unreported*) is relied upon as authority that a decision should be in strict accordance with the pleadings. This is reflected in that part of the speech of Lord Radcliffe in *Esso Petroleum Co Ltd v Southport Corporation* [1956] 2 WLR 81 at p 91 when he said:
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> > "If an appellate court is to treat reliance as pedantry or mere formalism, I do not see what part they have to play in our trial system."'

In another part of the same decision, particularly at p 126 of the report, his Lordship Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court) continued in serious vein:

> 'The case under consideration is simple and straightforward. Although the appellant pleaded in her statement of claim that she was "lawfully walking along the proper side of the road", in her evidence she clearly said that she was walking across the road. Moreover, in her police report, in the agreed bundle of documents (exh P1) at the trial she stated that she was crossing the road. Indeed the defendant in his defence and his evidence stated that the plaintiff was crossing the road from left to right.
>
> It is clear therefore that the defendant was not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleading because from the very outset it was the contention of and the case for the defendant, that the plaintiff was walking across the road and not along the road.'

With these principles in mind, I shall now proceed to narrate the facts.

In regard to the tort of malicious prosecution, the case of *Ng Ah Ho* is an authority for the proposition that a claim for malicious prosecution ought to be specifically pleaded. The amended statement of claim showed that malice had not been pleaded. The plaintiff had amended his statement of claim on 11 February 2000 to remove the allegation of bad faith. In amending his statement of claim by specifically deleting the allegation of mala fide, it must necessarily negate the existence of the claim grounded in malice. It was part and parcel of my judgment that the plaintiff had not pleaded the tort of malicious prosecution in his amended statement of claim. At any rate, it was not disputed that at the time the bankruptcy proceedings were commenced by the defendant against the plaintiff, the judgment debt was actually due from the plaintiff. There was thus no malice since the plaintiff was in fact indebted to the defendant when the bankruptcy proceedings were commenced. Macrossan J, in *QIW Retailers Ltd v Felview Pty Ltd & Anor* (1989) 7 ACLC 510 at p 519, had this to say in regard to the torts of malicious prosecution and an abuse of process in the context of a winding-up of a company:

> The mental ingredients involved in the commission of both torts are to be assessed by considering the attitudes, beliefs and objectives of the second defendant.

Further down the same page, his Lordship Macrossan J, said:

> In malicious prosecution, a plaintiff has to prove that proceedings have been maliciously instituted, or continued against him and that they have terminated in his favour. He is obliged to show, as well, that the proceedings were so broad or continued without reasonable and probable cause and that some special injury or damage has been sustained by him in consequence.
>
> In the tort of malicious prosecution, want of reasonable and probable cause is an additional ingredient for which proof is required in addition to malice: *Glinski v McIver* [1962] AC 726 at p 744.

In regard to the concept of reasonable and probable cause, his Lordship Macrossan J, said at p 520 of the report:

> The concept involves a belief based upon reasonable grounds of the existence of a state of circumstances which, if true, would reasonably lead an ordinary prudent man, placed in that situation, to the conclusion that the proceedings would probably succeed. The belief referred to may not always need to be inquired into but the facts as they were known to the one who instituted the relevant proceedings do need to be established and scrutinized: per Denning LJ in *Tempest v Snowden* [1952] 1 KB 130 at pp 138–139.

Pertaining to the tort of an abuse of process, Gopal Sri Ram JCA writing for the Court of Appeal in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425, had this to say (see pp 434–435 of the report):

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

At p 438 of the report, his Lordship Gopal Sri Ram JCA in the same case rounded up the matter in these words:

> In my judgment, the essential elements of the tort of abuse of process are these:
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> (1) The process complained of must have been initiated;
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> (2) The purpose of initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and
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> (3) The plaintiff must have suffered some damage or injury in consequence.
>
> It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of profess need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.

By way of reiteration, the amended statement of claim did not reveal any allegations by the plaintiff of an ulterior motive or a collateral purpose on the part of the defendant. In my judgment, the amended statement of claim did not plead the tort of an abuse of process. At any rate, under O 18 r 12(1)(b) of the RHC, the plaintiff was obliged under the law to plead certain particulars and that rule is worded in this way:

> (b) Where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

It was certainly obvious that the plaintiff could if he wanted to have pleaded the torts of malicious prosecution and an abuse of process and he saw it fit not to do so. He must be held accountable for his own misfortune.

Conclusion

For all these reasons, I must accordingly hold that the amended statement of claim in its present form did not disclose any cause of action tenable in law. It was my judgment that the appeal in encl 29 must be dismissed with costs.

Appeal dismissed.

Reported by Peter Ling